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CHARLES ELMORE CROPLEY

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

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## No. 49

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BERNARD B. BAILEY,

*Appellant,*

*vs.*

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

*Appellee*

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## PETITION FOR REHEARING

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BERNARD B. BAILEY,

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

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*Appellant,*

*vs.*

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

*Appellee*

## PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

The appellant respectfully petitions the Court for a rehearing and for a reconsideration and withdrawal of the Court's judgment and opinion rendered on November 5th, 1945, in the above styled cause.

### Grounds

The grounds upon which the appellant relies are that the Court erred in that it (1) ignored the appellant's question and contentions pertaining to the statute assailed, (2) relied upon irrelevant criteria and points not in dispute in passing upon the procedural soundness of the statute, (3)

employed incorrect statements of fact by which a path was cut to the conclusion that the Federal question pertaining to interest was not properly presented, (4) relied upon pure conjecture in determining that the award may have included interest, ignoring the record proof to the contrary and the appellant's contentions in the Reply Brief, and (5) deprived the appellant of his property without a full, fair, and candid hearing contrary to the due process clause of the Fifth Amendment of the Constitution of the United States.

## ARGUMENT

### 1. Appellant's Questions and Contentions Concerning the Statute

The Court did not consider the appellant's objection that the statute assailed is lacking in due process in subjecting the condemnation procedure to the appellant's administrative discretion: The Court did not mention the provision in Section 1969j(4) of the Virginia Code that "such property and rights of way may, in the discretion of the Commissioner, be condemned after the construction of the highway, as well as prior thereto," or the mandatory provision in Section 1969j(2) that the Court shall direct the Commissioners "to view the land." By eliminating from the appellant's contentions the element of administrative control by the appellee of the viewing of the property by the Commissioners, and by not quoting or specifically mentioning these statutory provisions, the Court has mutilated and devitalized the question presented by the appellant. The Court has removed from view the appellant's objection to the appellee's power to remove from view the original condition of the mutilated and disfigured property.

It is no answer to say that the Court expressly referred to the statute, and that anyone can read the statute and ob-

serve the provision for administrative control of the view. The point is that the Court did not refer to the fact that the appellant objected to the administrative control of the view. Even though a provision in a statute is glaringly objectionable, the Court has no power to pass upon it unless the appellant objects to it. One who reads the Court's opinion, knowing that the Court's power to review is shaped by the appellant's objections, will draw the logical and inevitable conclusion that since the Court did not pass upon the appellee's statutory control of the view, the appellant did not object to it. The appellant is thus displayed by the Court's opinion as one who did not recognize any constitutional infirmity in the ugly, one-sided, and coercive provision by which the appellee dominates the viewing of the property and controls the vital phase of the procedure by which just compensation is determined.

Throughout the appellant's first assignment of error he referred to the appellee's statutory control of the viewing procedure. He claimed that the statute violates the 14th Amendment because it vests in the appellee the power "to control the time for instituting condemnation proceedings", and "enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of Commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure", and because "the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage."

In the appellant's brief he contended that the statute does not afford due process (1) because it "injects into the Virginia system of viewing condemned property the absolute and unlimited power of the appellee to mutilate and disfigure the property before it is viewed," thus vesting in the appellee the "combined power to mutilate the property and to manipulate the time for the view" (p. 23), and "grants to the appellee the absolute power" to distort and destroy evidence of the value of the property in its original condition, which is the chief element in determining compensation and damages (p. 24); (2) because the purpose of the administrative control vested in the appellee by the statute is to place the appellee in a superior bargaining position in negotiating for a settlement, as shown by the legislative history of the statute (pp. 28, 29), and by the undisputed evidence of the pressure exerted against the appellant in an effort to effect a settlement for one-fourth of the amount finally awarded, which constitutes a perversion of administrative discretion (pp. 29, 30); (3) because the administrative control bestowed by the statute enabled the appellee to withhold and destroy evidence that was material and important in the determination of the amount to which the appellant was entitled which could not be adequately overcome by testimony at the hearing, before the Commissioners and the Court, because of the deference accorded by the trial and appellate Courts to the determination of the commissioners based upon the impressions received through their view of the premises (pp. 30, 31, 32); and (4) that the administrative control bestowed by the statute does not safeguard the fundamental right to a fair view in the Virginia condemnation system in which a viewing of the property is mandatory (pp. 32, 33, 34).

The Court gave scant treatment to these contentions, simply saying that the appellant contended that Section

1969j(4) "infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation." This revised statement of the appellant's contentions does not mention the administrative control bestowed by the statute, or the power of the appellee, also derived from the statute, to force the appellant into a disadvantageous bargaining position and to withhold and destroy material evidence in disregard of the appellant's right to a fair view in the mandatory viewing system. The Court stated also that the appellant "was given full opportunity to be heard and to introduce evidence before the Commissioners," and that the Commissioners "could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute."

By failing to mention the appellee's absolute control of the view, the Court implies that the appellant made no objection to the fact that the appellee withheld the view until it suited him to have the property inspected by those who determined what the appellant should receive. The Court implies that the appellant made no objection to the fact that the appellee forced the appellant to take a defensive position, and forced the appellant to counteract by testimony the unfavorable impressions which the appellee through his statutory power caused the Commissioners to receive when they viewed the property. It appears from the Court's opinion, that the appellant simply objected to the appellee's statutory power to enter and construct the highway before the property is viewed.

Of course the statute would be unobjectionable if it did not allow the appellee to control the view. The statute

would be intolerable if it *expressly* provided that the appellee shall have the exclusive power to determine whether the property in its original condition shall be viewed by the Commissioners. In its present form the statute gives that power to the appellee, but the power is disguised in the garb of the power to determine whether the property shall be condemned before or after the construction of the highway. To say that the Court would not be justified in ignoring an objection to an *express* provision for administrative control of the view, but is justified in ignoring an objection to an *implied* provision for administrative control of the view—"to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them." *Snyder* v. *Mass.*, 291 U. S. 97, 122.

By ignoring the restraining and bargaining features of the statute, the appellee's dominant position, the appellant's subordinate position, and the appellant's disadvantage in the ascertainment of just compensation, the Court has cut out the very heart of the appellant's contentions, leaving only the lifeless form of contentions that have "long been settled."

### 2. Irrelevant Criteria

The Court relied upon points not in dispute, disregarding the express statements in the appellant's brief with reference to the mutilation of the property before condemnation, and with reference to the viewing of the property by those who ascertain compensation.

The appellant expressly conceded that without violating the Fourteenth Amendment property may be taken and mutilated before payment of compensation or before instituting condemnation proceedings "where the statute does not establish a procedure for ascertaining compensation and damages that allows the highway authorities to con-

trol the time in which to institute condemnation proceedings." (Appellant's brief, p. 22.) In its opinion the Court stated: "But it has long been settled that due process does not require the condemnation of land to be in advance of the occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken." Obviously the Court disregarded the appellant's contention that administrative control of the time in which to institute condemnation proceedings, which necessarily involves absolute control of the mandatory viewing procedure, is constitutionally objectionable.

From the Court's opinion it appears that the appellant objected simply to the occupation of the land before it was condemned, which is directly contrary to the express statement in the appellant's brief. The appellee's administrative control of the time for instituting proceedings, and his power to cause a view to be made after the mutilation of the property, was obscured by the Court's reference to the opportunity of the appellant to be heard and to offer evidence as to the value of the land taken. The appellant did not contend that he had no opportunity to be heard or to offer evidence as to the value of the land taken. His objection was that the appellee's statutory control of the view is not counterbalanced by the appellant's right to be heard and to offer evidence as to value. The Court ignored the appellant's reference to *Snyder* v. *Mass.*, 291 U. S. 97, and the appellant's contention that the withholding of the view, "the inevitable effect" of which is "that of evidence" (p. 33 of brief) constitutes a deprivation of a right "ranked as fundamental" (p. 32 of brief) even though the owner is allowed a hearing and an opportunity to offer evidence.

It has not "long been settled", and by its opinion in this case the Court has not settled that due process does not

require that the procedure for the determination of just compensation shall be free from the dominating and coercive control of state officials exercising the power of eminent domain "provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken."

The appellant expressly conceded in his brief that without infringing the Fourteenth Amendment "a state may require that the property be viewed by commissioners appointed to determine the compensation and damages" (p. 23). It was not necessary, therefore, for the Court to observe that the value "may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had." Whether a hearing is required after an entry and after the view is an entirely irrelevant question brought into the case by the Court, not by the appellant. The fact that a hearing is not required after entry and view, if the award is subject to a proper review, has no bearing whatever upon the real question which the appellant plainly presented for the Court's decision, namely, whether a view is in accord with due process when it is subject to the exclusive control of a state official who forces the owner to accept a view, after the property has been mutilated and disfigured at the pleasure of the official, as the basis for determining the value of the property before it was mutilated and disfigured. The appellant's question has been blotted out by the interpolation of an extraneous question.

The appellant's question is again avoided by the Court in the statement that the commissioners "could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute." The question is not whether they *could* do so, or whether it was their *duty* to do so. The question is whether due process requires that they shall not

be *forced* to do so by a state official exercising the power of eminent domain. Without the element of sovereign control and domination, obviously the owner can not complain if he is "given full opportunity to be heard and to introduce evidence before the Commissioners" after they have viewed the mutilated property, because the owner would have full opportunity to act promptly on his own motion to have the property viewed before the evidence of its original value is obscured from view. But with the sovereign control and domination the owner has no such choice, and he is forced to accept a disadvantageous view and to rely upon the *duty* of the commissioners to consider impressions through their ears to overcome impressions received through their eyes, the "inevitable effect" of which is "that of evidence". *Snyder* v. *Mass.*, 291 U. S. 97, 121. The *duty* of the commissioners under the statute is a veil too thin to conceal the *duty* of a state official under a free government to keep his manipulating hands off the fundamental procedure by which private property is wrested from an individual against his will. The power of a state official to select the type of evidence that the viewers shall see with their eyes is no different from the power of a state official to select the type of testimony that the viewers shall hear from the lips of witnesses after the view. No Court would hold that the appellee may determine what evidence shall be received in the court room. Likewise, no Court, if it squarely and fairly considered the question, would hold that the appellee may determine what evidence the viewers shall consider outside the court room.

Further disregard of the question of administrative control of the view is shown by the Court's statement that the award is made subject to judicial review and may be set aside "if plainly wrong or without support in the evidence." That the award may be set aside for these reasons does not touch the appellant's question whether the appellee may

distort the evidence upon which the award is based, the very evidence that carries the greatest weight when the award is judicially reviewed. From *Barnes* v. *Tidewater Ry. Co.*, and *Duncan* v. *State Highway Com'r.*, cited by the Court and by the appellant, and from the other cases cited by the appellant (p. 24 of brief), the Court failed to extract the principle which has long been settled in Virginia and by this Court that the evidence received through a view of the property outweighs the evidence adduced at the hearing, constitutes the controlling factor in the determination by the viewers of the amount to be awarded, and is the very basis for the rule that the award will not be disturbed in the absence of some irregularity in the proceeding. In *Cranford Paving Co.* v. *Baum*, 97 Va. 501, 503, 504, the Court said: "The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken, and judging as to its value * * *. We are without the benefit of their opportunities, and of what they saw and were the judges." In *R. & P. Electric Co.* v. *Seaboard A. L. Ry.*, 103 Va. 399, the Court referred to the decision of this Court in *Shoemaker* v. *U. S.*, 147 U. S. 282, 306, in which the Court approved the statement in Mills on Eminent Domain that the commissioners "hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence." To the same effect is *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 560. In *Hunters' Adm.* v. *C. & O. R. Co.*, 107 Va. 158, 171, 172, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, and the Court said that the commissioners are "greatly aided in the majority of cases by the evidence of their own senses, they having

the advantage of seeing the property itself which is taken, and judging as to its value." In *Barnes* v. *Tidewater Ry. Co.*, 107 Va. 263, 267, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, the Court saying that the commissioners make their principal evidence "out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence." In *Duncan* v. *State Highway Comr.*, 142 Va. 135, 147, 148, emphasis was placed upon the fact that the commissioners "go upon the land, examine it", and have the advantage of "inspecting the property", as well as hearing the witnesses. In *Monticello Min. Springs* v. *City of Richmond*, 147 Va. 355, 367, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, and said that the commissioners "may base their finding largely upon facts obtained by a view of the property, which do not appear in the record." In *Shirley* v. *Russell*, 149 Va. 658, 664, the Court said: "The law lays great stress upon the view. The commissioners are greatly aided, as they were in this case, by the evidence of their own senses, and the law justly attaches great weight to their report." In *Yeary* v. *Holbrook*, 171 Va. 266, 276, the Court quoted with approval from Wigmore on Evidence, that an "autoptic inspection" of the premises "is an even more direct and satisfactory source of proof" than testimonial evidence.

Thus the Court, in saying that the "award is made subject to judicial review by Section 1969j(2), and upon such review may be set aside if plainly wrong or without support in the evidence", completely ignored the question presented by the appellant whether due process requires that the viewing of the property shall not be subjected to the dominating and coercive control of a state official where the evidence received through the view outweighs the evidence adduced at the hearing and is the very basis upon which the Court refuses to disturb the award upon a judicial review. The ques-

tion presented is not whether the statute provides for a judicial review, but whether the statute is constitutional in allowing the appellee to tamper with and completely control the evidence upon which the Court relies in refusing to disturb the award when it is judicially reviewed. The Court has not faced the real question at all.

### 3. Incorrect Statement of Facts Concerning Interest

In constructing the argument by which the Court concluded that the appellant did not properly present the federal question concerning interest, the Court made incorrect statements, for which there is no support in the record, as follows:

> "Appellant also insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation. * * * Appellant's petition in the circuit court asked that the award include interest from the date of taking. The circuit court, without explanation overruled his exceptions to the failure of the Commissioners' report to award the interest demanded."

If the appellant excepted to the commissioners' report because it did not award interest, clearly the appellant should have apprised the circuit court of the ground of his exception. If the appellant did not except to the commissioners' report because it did not award interest, it is equally clear that when the appellant asked the circuit court to allow interest on the amount awarded by the commissioners it was not necessary to set up as the ground for the request the contention that if the court refused the request the appellant would be deprived of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. It is also true that if the Court's statements are incorrect, they constitute an

unjust reflection upon the appellant's knowledge of proper procedure and upon his ability to present a federal question at the proper time in order to bring it to this Court for review.

The appellant did not file a petition in the circuit court, but he filed a plea as his grounds of defense (R. 4). In the plea he did not ask "that the award include interest." The plea speaks for itself. In paragraph 3 of the plea the appellant claimed "interest at the lawful rate on the total amount awarded as compensation and damages * * *." This language does not justify the Court's statement that the appellant asked that the *award include* interest. The only possible ground for saying that the appellant asked that the *award include* interest would be that it is not the province of the court to add interest to the award, which is not a valid ground because the court obviously has that power. See 20 C. J. Section 252, p. 811; 29 C. J. S., Section 176, p. 1056. The appellant asked for interest *on* the award, not that interest be *included in* the award.

In his third assignment of errors, the appellant expressly insisted that the Virginia Court erred in denying interest "on the amount awarded." Obviously this Court was incorrect in stating that the appellant insisted before this Court that the state court judgment failed to "include in the award" interest, etc. * * * and that the "award thus denied" to him just compensation, etc. By interpolating the words "include", "in", the words "award thus denied", and the words "failure of the Commissioners' report to award the interest demanded", words not shown in the record or in the appellant's petition for appeal or in his brief, the Court committed gross error which changed completely the appellant's claim and contention and laid the foundation for the conclusion by which the Court avoided the consideration of the constitutional question. Even though the Court should find some other ground for

avoiding the constitutional question, it is under a plain duty to correct its statements since they are highly detrimental to the appellant.

That the appellant did not ask in the circuit court that the *award include* interest, but asked that the Court add interest to the award, is shown by the record fact that after the award was made the appellant, after waiving his claim for interest on the amount awarded for the land taken, moved the circuit court to allow his plea to be amended to show the waiver and to show that he claimed interest on the amount awarded as damages to the residue (R. 35). If the appellant had asked in his plea that the *award include* interest, he would not have asked the court, after the award was made, for permission to amend the plea. The circuit court expressed the opinion that the appellant was not entitled to interest "on the amount awarded", and stated that the appellant's claim for interest "on the $6,500.00" was denied (R. 35). There is nothing in the record to justify the implication that the appellant first submitted to the commissioners his claim for interest, and then after they had failed expressly to grant it the appellant tried to reopen his claim by applying to the court to allow interest on the amount awarded as damages.

That the appellant did not ask in the circuit court that the *award include* interest is shown further by the fact that the appellant did not ask the court to instruct the commissioners to include interest in their award. By stating that the appellant asked in his plea that the *award include* interest the Court implies that the appellant and the circuit court failed to exercise the skill and care necessary to inform the commissioners with respect to their duty to award interest.

Since the appellant did not ask in the circuit court that the *award include* interest, there is no foundation for the

Court's statement that the appellant made *exceptions to the failure of the Commissioners' report to award the interest demanded.* Furthermore, the appellant's exceptions to the report show conclusively that interest was not mentioned or contemplated. The appellant excepted to the commissioners' report on the ground "that the amounts awarded as compensation for the land taken for the highway and for damages to the residue resulting from the highway construction are grossly disproportionate to the claims made by the defendant, which claims were based upon a view of the property before as well as after the property was mutilated and disfigured by the highway construction" (R. 29, 30). Obviously there were no *exceptions to the failure of the Commissioners' report to award the interest demanded* because the exceptions were expressly confined to claims which were *based upon a view of the property,* and the claim of interest was not based upon a view of the property. The error of the Court, in stating that the appellant excepted to the commissioners' report because it failed to award the interest demanded, was gross and obvious.

During the oral argument, Mr. Justice Black asked the appellant whether he excepted to the commissioners' award on the ground that it did not include interest, and the appellant replied that he did not because the question of interest was not submitted to the commissioners. By stating that the appellant excepted *to the failure of the Commissioners' report to award interest,* the Court contradicts without any proof the statement made by the appellant in open court.

Since the appellant did not ask that the award include interest, since he did not except to the commissioners' report on the ground that it failed to award interest, since he applied to the circuit court for interest on the amount awarded as damages, and since he had no reason to believe that the court would deny interest, it was not incumbent

upon him to raise the federal question with respect to his claim for interest until after the circuit court denied the appellant's claim for interest. *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 495; *Herndon* v. *Georgia*, 295 U. S. 441, 444. It was not the appellant's duty to state to the circuit court that he was claiming interest from the court, and that he wished to advise the court that if the court denied his claim for interest the denial would deprive him of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. When the appellant made his claim for compensation for the use of the property taken for the highway he set up the objection that to deny such compensation would deprive him of his property without due process of law contrary to the Fourteenth Amendment (R. 8), but the reason for that was that the appellant had been warned by the decision in *Bailey* v. *Anderson*, 182 Va. 70, that while the Court had not passed upon the statute assailed it showed that it was very reluctant to interfere with the statute and probably would be reluctant to allow compensation for the use of the property based upon the invalidity of the statute. But because the appellant may have been too cautious concerning his claim for compensation for use is no reason for saying that he should have exercised the same caution with respect to his claim for interest, because he had no cause whatever to believe that the circuit court or the Supreme Court of Appeals would deny interest.

Since it was not necessary to raise the federal question with respect to interest until after the circuit court had denied the claim for interest, Rule 22 of the Virginia Court has no application. That rule applies to objections, not to claims. Neither that rule nor the decisions of the Virginia Court required the appellant to make a second request to the circuit court to allow interest on the damages awarded accompanied by an objection that the circuit

court's denial of the first request to allow interest violated the Fourteenth Amendment. The appellant's first opportunity to raise the federal question after the circuit court denied his claim for interest was in his petition for writ of error to the Supreme Court of Appeals to review the ruling of the circuit court denying the claim for interest. Since the federal question was timely presented, the failure of the Supreme Court of Appeals specifically to pass upon the federal question is immaterial, and this Court has jurisdiction. *Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 282.

The Court states that the appellant's assignments in the Supreme Court of Appeals relating to interest "failed to draw in question the constitutional validity of any statute as is required by Section 237 (a) of the Judicial Code." The theory upon which the appellant claims that this Court has jurisdiction upon appeal to review the question of interest is not that the claim for interest derives from a statute, but that the claim is included in a case in which Section 1969j(4) was assailed as in violation of the Fourteenth Amendment and the statute was upheld by the state courts. *Flourney* v. *Weiner*, 321 U. S. 253, 754; see also *Prudential Ins. Co. of America* v. *Cheek*, 259 U. S. 530, 547; appellant's Jurisdictional Statement, p. 14. Aside from that, the Court is not justified in refusing to consider the federal question relating to interest under Section 237 (c) of the Judicial Code, by way of certiorari.

**4. Conjectural Conclusion as to Inclusion of Interest in Award**

The Court has accepted without analysis the superficial argument of the Attorney General that the award included interest. It has relied upon two Virginia decisions which are not in point at all for the reasons set forth in appellant's

reply brief (pp. 11-21). After the appellant had taken great pains to distinguish these and other cases cited by the Attorney General, and after the appellant had employed most of his time on the oral argument in an effort to draw the attention of the Court to the undisputed facts in the record which point unmistakably to the fact that the commissioners did not include, and did not consider, interest in their report of the award, the Court in its opinion makes the startling statement that "Nothing appears to the contrary", and accepts without question or discussion the general and loose argument of the appellee. The appellant's reply brief was filed after the oral argument, but he obtained the permission of the Court to file it because the appellee failed to file his brief in time. There is no indication that the Court considered the analysis and argument presented in the appellant's reply brief. The Court can not state that nothing is shown to dispute the appellee's argument without having failed to consider the appellant's reply brief, and if the appellant's reply brief has not been considered he has not been afforded a full and fair hearing on the question presented.

That the commissioners did not consider the question of compensation, by way of interest or damages, for delay in payment or for the use of the land is shown by the affidavits of four of the commissioners, which are filed herewith and made a part hereof, as follows:

> "* * * In making up our award of compensation and damages, we did not consider or pass upon the question whether the defendant was entitled to interest, damages, or compensation for delay in payment of the amount awarded, or for the use of his land for highway purposes before payment of the amount awarded. Interest was not included in the award."

These affidavits are submitted to the Court for the purpose of supporting and explaining the record, not to im-

peach it. 64 C. J., Section 914, pp. 1108 et seq. That an affidavit is admissible to show that the jury did not consider interest is shown by *Swails* v. *Cissna*, 61 Iowa 693; see also *Davis* v. *Huber Mfg. Co.*, 119 Iowa 67; *Strand* v. *Grinnell Auto. Garage Co.*, 136 Iowa 68; *Miller* v. *Blue Ridge Transp. Co.*, 123 W. Va. 428.

While evidence dehors the record will not be received to supplement the record (*Henneford* v. *N. Pac. Ry. Co.*, 303 U. S. 17, 19; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589), it will be received to show that the question in the case is moot (*Dakota County* v. *Glidden*, 113 U. S. 222, 226; see also *Elwell* v. *Fosdick*, 134 U. S. 500, 513; *Kimball* v. *Kimball*, 174 U. S. 158, 162; *Gulf, Col. & S. F. Ry.* v. *Dennis*, 224 U. S. 503, 508; *Kendall* v. *Ewert*, 259 U. S. 139, 147, 148), and there is no reason for rejecting it when offered to show that the question is not moot, particularly where, as in this case, there is no evidence in the record that the question is moot, and the conclusion that the commissioners may have included interest in their award is made "without reference to any evidence, upon proofs drawn from the clouds." *Ohio Bell Tel. Co.* v. *Pub. U. Com.*, 301 U. S. 292, 307.

It was not the appellant's duty to produce these affidavits in the Virginia courts to cure some defect in the record. The affidavits bear upon a question of doubt raised for the first time in this Court, a doubt which the Court was not justified in raising from the record. To reject the affidavits because they are not technically in the record, and to rely upon a vague doubt that has ceased to have any probative force, would be to smother known truth with a technicality, and would "deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal, the means of inflicting gross injustice." *Dakota County* v. *Glidden*, 113 U. S. 222, 226.

If the Court rejects the affidavits as proof that interest was not included in the award, there is no reason for not

remanding the case so that the evidence of the truth can be brought into the record to satisfy the technical requirement of the Court. Obviously the Court is not powerless to direct the course of this case so that truth and justice may be established. The affidavits are sufficient to cause the Court to recede from its technical position, and to dispose of the question realistically.

### 5. Denial of a Full and Fair Hearing

It is not the province of the Court to revise or reshape the questions and contentions presented, particularly where the result is to dismiss the question and contentions because they are unsubstantial. A hearing is not judicial in any sense unless the precise question and contentions presented are made known by the Court and considered by it. *Cf. West Ohio Gas Co.* v. *P. U. Com.*, 294 U. S. 63, 69. Judicial procedure is "perverted from its proper function" when it becomes irresponsive to the pleadings and contentions of the parties. *Cf. Reed* v. *Allen*, 286 U. S. 191, 209, dissent of Mr. Justice Cardozo. It is not fair to the appellant to require him precisely and carefully to state and have printed the question presented, and the contentions pertaining to the substantial character of the question (Rules 9, 12, and 27 of this Court), and then for the Court without considering the precise question or the contentions to dismiss the petition for the lack of a substantial federal question. In spite of the natural reluctance of the Court to pass upon constitutional questions involving legislative policy, the avoidance of the difficulty should not be "pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379; *Hopkins Fed. S. & L. Assoc.* v. *Cleary*, 296 U. S. 315, 335. The doctrine of sovereign immunity allows the sovereign to consider or ignore questions adversely affecting its interests, but the doctrine does not authorize the Court to sift the issues and select the

questions to be considered in a controversy in which the agent of the sovereign is a party.

The appellant contends that he has not been accorded by this Court a "full and candid" hearing (*Roberts* v. *New York*, 295 U. S. 264, 278), and unless the Court grants a rehearing he will be deprived of his property without due process of law contrary to the Fifth Amendment of the Constitution of the United States, in that the Court has not considered the appellant's precise question and contentions concerning the statute assailed, has relied upon irrelevant issues which have obscured the appellant's contentions, and upon incorrect statements which have completely changed the basis upon which the federal question as to interest was presented, and has accepted a superficial theory of inclusion of interest in the award of compensation without giving any effect to the record facts or to the contentions made by the appellant in his reply brief.

## Conclusion

WHEREFORE, the appellant prays that the judgment of the Court dismissing his petition for appeal for want of any properly presented substantial federal question be set aside, that a rehearing be granted, and that the Court grant the relief prayed for in the petition for appeal, and for such other relief as the Court may determine to be just and proper.

Respectfully submitted,

BERNARD B. BAILEY,
*Pro se.*

## Certificate

I, Bernard B. Bailey, do hereby certify that the foregoing petition is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

BERNARD B. BAILEY,
*Pro se.*

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# SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1945.

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|---|---|
| Bernard B. Bailey, Appellant, *vs.* J. A. Anderson, State Highway Commissioner of Virginia. | Appeal from the Supreme Court of Appeals of the State of Virginia. |

[November 5, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellee, State Highway Commissioner of Virginia, brought this poceeding in conformity to §§ 1969j(1)-1969j(6) of the Virginia Code of 1942, to condemn appellant's land for use as a public highway. Acting under § 1969j(4), appellee entered on the land and constructed the highway in advance of its condemnation. In the condemnation proceeding, begun in the circuit court within sixty days after the completion of the highway, the Commissioners, appointed and acting pursuant to § 1969j(2), after viewing the land, and hearing evidence, made an award of $1,500 for the land occupied by the highway, and of $6,500 for damages "resulting to the adjacent or other property of the owner."

The Virginia Circuit Court confirmed the Commissioners' report, and by its decree directed that interest be paid on the amount of the award from the date of the decree. The Supreme Court of Appeals of Virginia, without opinion, denied appellant's petition for a writ of error. The case comes here on appeal, § 237(a) Judicial Code, 28 U. S. C. § 344(a), appellant assigning as error that §§ 1969j(4) and 1969j(6), as applied to appellant, deny to him the due process guaranteed by the Fourteenth Amendment. On examination of appellant's jurisdictional statement we postponed the question of our jurisdiction to the argument on the merits.

Appellant contends here, as he did in the state courts, that § 1969j(4) infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition, in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that due process does not require the condemnation of land

to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. *Bragg* v. *Weaver*, 251 U. S. 57, 62, and cases cited; *Joslin Co.* v. *Providence*, 262 U. S. 668, 677; *Georgia* v. *Chattanooga*, 264 U. S. 472, 483. Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review, in which a trial upon evidence may be had. *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569; *Bragg* v. *Weaver*, *supra*, 59, and cases cited; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284-285.

Here appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review by § 1969j(2), and upon such review may be set aside if plainly wrong or without support in the evidence. *Barnes* v. *Tidewater Railway Co.*; 107 Va. 263, 266-268; *Duncan* v. *State Highway Commission*, 142 Va. 135, 146-148. In this we find no denial of due process, and appellant's contention presents no substantial constitutional question, as the authorities cited show.

Appellant also insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation for the land taken, in violation of the due process clause of the Fourteenth Amendment. See *Del., L. & W. R. R.* v. *Morristown*, 276 U. S. 182. Appellant's petition in the circuit court asked that the award include interest from the date of taking. The circuit court, without explanation, ~~overruled his exceptions to the failure of the Commissioners to award the interest demanded~~. But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. Further, nothing appears in the record to indicate that the Commissioners' award of damages did not include the interest claimed. Appellee argues that the applicable statutes contemplate that the award shall include interest as compensation "for the damage and de-

rejected his claim for interest.

lay" from the time of the occupation of the premises to the date of the Commissioners' report and for such further time within which application may be made for judicial review, see *City of Richmond* v. *Goodwyn*, 132 Va. 442, 452-454; *Export Leaf Tobacco Co.* v. *Richmond*, 163 Va. 145, 155-156. Nothing appears to the contrary.

Appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the state Supreme Court of Appeals. The assignments relating to interest failed to draw in question the constitutional validity of any statute as is required by § 237 (a) of the Judicial Code. The state Supreme Court by its order refusing the writ of error declared that upon consideration of the record it was of opinion that the judgment below was "plainly right."

Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va. lxxv; cf. *Ward Co.* v. *Henderson White Co.*, 107 Va. 626, 628-629; *Bliss* v. *Spencer*, 125 Va. 36, 50; *Reynolds* v. *Adams*, 125 Va. 295, 314. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. *Jacobi* v. *Alabama*, 187 U. S. 133, 135-136; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 309; *Chicago, Ind. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 131; see *Flournoy* v. *Wiener*, 321 U. S. 253, 262-263, and cases cited.

The appeal must be dismissed for want of any properly presented substantial federal question.

*Dismissed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.